

REMARKS

The disclosure is objected to and the claim stands rejected pursuant to 37 C.F.R. §1.121(e) and under 35 U.S.C. §112, first and second paragraphs. Applicant believes that the amendments made to the specification specifically address the Examiner's objections detailed in Paragraphs A-B on page 2 of the Office Action. Withdrawal of the objection and reconsideration of the rejection under 35 U.S.C. §112, first and second paragraphs, is respectfully requested.

Claim 1 stands rejected under 35 U.S.C. §102(b) for asserted anticipation based on Canadian Plant Breeder's Right Application No. 97-998, published on April 30, 1997, in view of Applicant's previous admission that 'Cabot' was first publicly available in Canada after June 2, 1998.

The Examiner admits at page 4 of the Office Action that the cited publication standing alone is non-enabling. Additionally, it does not indicate what would constitute a public use or sale of 'Cabot' in the United States or abroad more than one year before the filing date of the instant application. According to new information provided to the Undersigned by the Applicant, the instant variety was not on sale or publicly available more than one year prior to February 11, 2002, the filing date of the parent application for 'Cabot'. Instead, the variety was only distributed to growers who acquire extremely small quantities of newly developed varieties for testing and trialing purposes on their farms. The testing and trialing period takes several years before a grower would even begin to decide whether to commercialize the variety. This is especially true for 'Cabot' due to its slow-running trait. Further, 'Cabot' was not even listed on the invoices to the growers under its varietal denomination. Instead, it was listed as ST-CAB (please see the attached invoices). Additionally, please see attached one example of a representative Testing Agreement used in these distributions for 'Cabot'. Thus, the distributions to the growers were obscure occurrences for testing and trialing purposes only that would go unnoticed by those skilled in the art.

In view of the above, because the new variety was never disclosed in an enabling publication, it was not publicly available anywhere more than one year before the effective filing date of the present application, and it was only available for testing and

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In Reply to USPTO Correspondence of July 13, 2005
Attorney Docket No. 3139-040120

trialing purposes, the rejection under 35 U.S.C. §102(b) is wholly inappropriate. Withdrawal of the rejection under 35 U.S.C. §102(b) is respectfully requested.

CONCLUSION

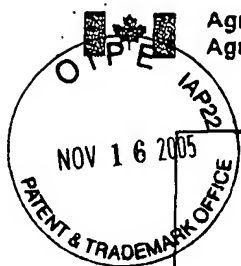
In light of the foregoing, allowance of the claim is respectfully requested.

Respectfully submitted,

THE WEBB LAW FIRM

By Patricia A. Olosky

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Agriculture and Agri-Food Canada Agriculture et Agroalimentaire Canada

**Agreement for Testing New Fruit Varieties Developed at the
Atlantic Food and Horticulture Research Centre,
Agriculture and Agri-Food Canada, Kentville, Nova Scotia, Canada**

Recipient/Cooperator: (name/organization) Dr. David Wildung

(address) U. of Minnesota, North Central Exp. Station, Grand Rapids MN

Crop and Varieties: Strawberry: 'Cabot', 'Sable', 'Brunswick', 'Evangeline', K93-20

The Atlantic Food and Horticulture Research Centre (AFHRC) appreciates your desire to test the new fruit cultivars or numbered selections specified above. To safeguard our commercial interests the material is supplied subject to the following conditions:

1. The plants and all propagated material remain the property of AFHRC and are for experimental use only. They will not be sold, given away, or otherwise distributed. They will be destroyed if so requested by AFHRC.
2. Propagation is prohibited. Permission for propagation must be obtained in writing from the Director of AFHRC.
3. Any mutant, variant, or sport must be reported to AFHRC and remains the property of AFHRC.
4. AFHRC is not held liable for any loss which may arise from such plantings or experiments.
5. The results of experiments or trials and any reports relating to the material will be made available to AFHRC.
6. The Cooperator will restrict the general public from access to the trial.

Please complete and sign this form, copy for your records, and return original to: Dr. A.R. Jamieson, Agriculture and Agri-Food Canada, Atlantic Food and Horticulture Research Centre, 32 Main Street, Kentville, Nova Scotia B4N 1J5

The acts of the AFHRC and the Cooperator in signing this Agreement and the Cooperator receiving the specified Varieties shipped in view of this assigned Agreement, are intended by the parties to create a legally binding contract.

FOR COOPERATOR:

By: Dr. David K. Wildung

David K. Wildung

(type or print name)

Date: 5/7/99

FOR AGRICULTURE AND AGRI-FOOD CANADA:

AR Jamieson

Andrew R. Jamieson

(type or print name)

15 July 1999

Canada

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DATE

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SAME

C. O. KEDDY NURSERY INC.
962 North Bishop Road
Kentville, Nova Scotia
Canada B4N 3V7
(902) 578-4497

Just Another Farm
Hunter River
PEI
CQA 1W0

Shipper

Thompson's

Terms -Net 30 days
P.O. #

ITEMS	QUANTITY	UNIT PRICE	TOTAL PRICE	DESCRIPTION	NET AMOUNT	SHIPPING	GST	TOTAL
ST-SP4	2000	ea	144.00	Sparkle Strawberry Plants	435.00	31.50		
ST-CAB	1000	ea	85.00	Cabot Strawberry Plant				
ROY-CAB	1	ea	10.00	Royalty on Cabot Strawberry				
BL-HAR	5	ea	10.00	New Hardy Blackberry				
BLUE 4	2	ea	14.00	Blueberry				
BL-1	2	ea	14.00	Blue Crop				
BLUE 5	2	ea	14.00	Jersey Blueberry				
Interest charged at 2 % per month								
H S T # 882273188 RT								
TOTAL					435.00	31.50	32.66	499.16

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INVOICE

C. O. KEDDY NURSERY INC.
982 North Bishop Road
Kentville, Nova Scotia
Canada B4N 3V7
(902) 678-4497

PROD G

001938
06-03-00

DATE

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Garry Wood**Salmon River Farms
R.R. # 1, Box 2981 *
Yarmouth, *
N.S.
BSA 4A5

SAME

Shipper

Hong's

Terms -Net 30 days
P.O. #

ST-KENT	ST-CAB	ST-HON	ST-JEW	ROY-CAB	ROY-JEW	DUES	RA-BOY	BLUE 13	BLUE 10
6500	2000	4000	7500	2	2	22	100	100	15
ea	ea	ea	ea	ea	ea	ea	ea	ea	ea
Kent Strawberry Plant	Cabot Strawberry Plant	Honeoye Strawberry Plants	Jewel Strawberry Plants	Royalty on Cabot Strawberry	Royalty on Jewel	Hort. N.S. Dues	Boyne Raspberry Canes	Polaris Blueberry	Chippewa Blueberry
.075	.09	.075	.075	10.00	15.00	5.00	.45	7.00	7.00
637.50	180.00	300.00	562.50	20.00	112.50	110.00	45.00	70.00	105.00
Net amount	2,142.50	Shipping	50.00	320.00					
TOTAL	\$2,521.30								

Interest charged at 2 % per month

H S T # 982273188 RT

Net amount
Shipping
GST
H S T

TOTAL \$2,521.30

[illegible]

INVOICE

C. O. KEDDY NURSERY INC.
962 North Bishop Road
Kentville, Nova Scotia
CANADA

(902) 678-4497

AUTT G

06-05-00

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Gorden Butterworth Farms Ltd,
Site 1 Box 19,
Markland,
NFLD
AOB 3KO

SCHE

Shipper Day & Ross

Terms - 30 Days
P.O. #

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